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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK NICOLE ARCHIBALD and ELLEN OGAIAN on behalf of themselves and all others similarly situated, Plaintiffs. -against- MARSHALLS OF MA, INC., a Delaware corporation; THE TJX COMPANIES INC. a Delaware corporation, and DOES 1 through 100, inclusive. Defendants.	Case No: 09-CIV-2323 LAP PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS; MEMORANDUM OF POINTS & AUTHORITIES

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I. INTRODUCTION

Plaintiffs Nicole Archibald and Ellen Ogaian ("Plaintiffs") have brought the instant proposed class action on behalf of current and former assistant managers employed at Marshalls department stores in New York. Plaintiffs seek to recover unpaid overtime compensation under the New York Labor Law resulting from Defendants' categorical classification of assistant managers as exempt employees.

Defendants now seek dismissal of Plaintiff's Complaint at the pleading stage by way of a *pro forma* motion to dismiss advocating that this Court strike down overtime regulations that have been on the books for more than ***20 years***. In support of this action, Defendants offer this Court a series of fallacious arguments.

First, despite the existence of statutes and regulations expressly mandating that that employers compensate for "overtime at a rate of one and one-half times the employee's regular rate…." for any hours in excess of 40 hours per week (12 N.Y.C.R.R. § 142-2.2), as well as a literal ***mountain*** of judicial authority recognizing overtime claims predicated on New York Labor Law, Defendants asserts that this Court should follow the lead of three courts that have declared (without any supporting analysis) that the New York Labor Law contains no provisions for overtime pay. In making this argument, Defendants neglect to inform the Court of the ***mountain*** of judicial authority disproving their position, not to mention the fact that the authority on which they rely has been soundly criticized as lacking any supporting analysis. *See Diaz v.*

Electronics Boutique of Am., Inc., 2005 U.S. Dist. LEXIS 30382, 29-30 (W.D.N.Y. Oct. 13, 2005).[1]

Second, Defendants then claim that this Court should conclude that the Commissioner's creation of overtime regulations exceeded the bounds of its rule making authority – an argument made in complete disregard of the fact that overtime regulations were expressly contemplated by the Legislature, as evidence by a specific statutory delegation of authority. *See N.Y. Lab. Law § 655(5)(b)*("Such recommended regulations may also include, but are not limited to, regulations governing … **overtime** or part-time rates….").

Finally, Defendants then urge this Court to invalidate the overtime regulations by claiming the Commissioner unlawfully ceded his authority to the federal government by incorporating the FLSA into the regulations, despite clear procedures allowing for such an incorporation by the Commissioner.

After Defendants try to rid New York of its overtime laws, Defendants' then argue that Plaintiffs' class claims are barred by CPLR § 901(b) because Plaintiff has not waived liquidated damages. However, as Plaintiffs Complaint contains no demand for liquidated damages, Defendants argument is without any basis whatsoever.

For the foregoing reasons, which are discussed in detail herein, Defendants' Motion to Dismiss must be denied in its entirety. Additionally, Plaintiffs' request for injunctive relief and reliance on Article 19 of the New York Labor Law is proper. Therefore, Defendants' motion to strike must also be denied.

II. ARGUMENT

[1] In addition, Defendants' argument contravenes Second District authority recognizing a right to overtime compensation under Section 142-2. *See Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 79 (2d Cir., 2003) (holding district Court erred in dismissing Section142-2 claim)

A. LEGAL STANDARD APPLICABLE TO MOTION TO DISMISS

Generally, a complaint should not be dismissed unless it appears that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). A court considering a motion to dismiss "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." *Tarshis v. Riese Organization*, 211 F. 3d 30, 35 (2d Cir. 2000). The review of such a motion is limited, and "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Villager Pond, Inc. v. Town of Darien*, 56 F. 3d 375, 378 (2d Cir. 1995) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

As demonstrated below, Defendants' motion fails to meet the standard to dismiss and therefore should be denied.

B. PLAINTIFFS HAVE A VALID CLAIM FOR OVERTIME UNDER NEW YORK LAW

In an effort to evade liability for their failure to provide overtime compensation under New York law, Defendants argue that 1) Plaintiffs do not have a statutory right to overtime under New York law, 2) the Labor Commissioner's creation of the overtime regulation was invalid, and 3) even if the Labor Commission was permitted to create a mandatory overtime requirement, he did not do so properly because he ceded his rulemaking authority to the federal government. *See* Def's. Mem. at 5-8. As demonstrated below, Plaintiffs can state a claim for overtime wages, as Defendants' arguments to the contrary are without merit.

1. Plaintiffs Have a Statutory Right to Overtime Compensation Under New York Law

Contrary to Defendants' contentions, the New York Labor Law requires employers to provide overtime wages to non-exempt employees. The New York Labor Law requires employers to pay their employees "overtime at a rate of one and one-half times the employee's regular rate...." for any hours in excess of 40 hours per week (12 N.Y.C.R.R. § 142-2.2; includes, *inter alia*, a specific definition of "employee" (12 N.Y.C.R.R. § 142-2.14 provides a list of the occupations the State considers exempt from receiving overtime pay (12 N.Y.C.R.R. § 142-2.14 (b) and (c)); imposes minimum wage requirements (12 N.Y.C.R.R. § 142-2.1); imposes requirements that minimum and overtime wage payments be based on each week of work (12 N.Y.C.R.R. § 142-2.9; provides a specific definition of what constitutes a "regular rate" (12 N.Y.C.R.R. § 142-2.16); and proscribes specific duties for employers to maintain detailed record keeping (12 N.Y.C.R.R. § 142-2.6).

Indeed, Defendants' argument that New York does not have an enforceable overtime law is one of nihilism, in that it is predicated upon the complete denial of a literal ***mountain*** of existing judicial authority recognizing overtime claims predicated on New York Law. The following is but a mere sampling. *See, e.g. Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 78-79 (2d Cir. 2003) (holding District Court erred in dismissing Section 142-2 claim); *Malinguez v. Joseph*, 226 F. Supp. 2d 377, 389 (E.D.N.Y. 2002) (denying employers' motion to dismiss on the grounds that "Plaintiff has stated a claim for overtime compensation under New York law."); *Velez v. Majik Cleaning Services, Inc.*, 2005 U.S. Dist. LEXIS 709 (S.D.N.Y. Jan. 19, 2005) (certifying overtime class action based on Section 142-2.2); *Torres v. Gristede's Operating Corp.*, 2008 U.S. Dist. LEXIS 66066 (S.D.N.Y. Aug. 28, 2008) ("in light of the Court's finding that the class members are non-exempt, [defendant] is liable to the co-manager class members for overtime compensation pursuant to ... 12 N.Y.C.R.R. § 142-2.2"); *Gonzalez v. Nicholas Zito*

Racing Stable, Inc., 2008 U.S. Dist. LEXIS 27598 (E.D.N.Y. March 31, 2008) (granting motion for leave to amend claim under Section 142-2.2); *Guzman v. VLM, Inc.*, 2008 U.S. Dist. LEXIS 15821 (E.D.N.Y. Mar. 2, 2008) (granting motion to certify New York overtime claims as a class action under Rule 23); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152 (S.D.N.Y. 2008) (same); *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363 (S.D.N.Y. 2007) (same); *Mascol v. E & L Transp., Inc.*, 2005 U.S. Dist. LEXIS 32634 (E.D.N.Y. June 29, 2005) (same); *Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330 (S.D.N.Y. 2004) (same); *Toure v. Cent. Parking Sys.*, 2007 U.S. Dist. LEXIS 74056 (S.D.N.Y. Sept. 28, 2007) (same); *Ansoumana v Gristede's Operating Corp.*, 201 F.R.D. 81 (S.D.N.Y. 2001) (same); *Mendoza v. Casa de Cambio Delgado, Inc.*, 2008 U.S. Dist. LEXIS 61557 (S.D.N.Y. August 12, 2008) (same). Thus, Defendants' unqualified assertion that the NYLL contains "no provision for overtime pay" is unquestionably an inaccurate representation of the existing legal landscape.

Moreover, while Defendants urge this Court to adopt the conclusions of three outdated opinions – a distinct minority in relation to the plethora of courts that have ruled that New York in fact ***does*** have a mandatory overtime law – it is important to note that the line of cases on which Defendants' currently rely have not only been criticized as lacking any supporting analysis, but also criticized as flying in the face of controlling precedent. For example, in *Diaz v. Electronics Boutique of Am., Inc.*, 2005 U.S. Dist. LEXIS 30382 (W.D.N.Y. Oct. 13, 2005), the court observed as follows:

> The court in *Hornstein* stated that "New York does not have a mandatory overtime law" without citing to a prior decision… *Gallegos* states the same and cites *Hornstein* for the proposition… Neither the *Hornstein* nor the *Gallegos* decision explains or justifies the proposition… Furthermore, subsequent to *Hornstein* and *Gallegos*, the Second Circuit Court of Appeals and other New York District Courts have verified that overtime claims may be brought pursuant to NYLL § 650 *et seq.* and that implementing regulation 12 NYCCRR 142-2.2 carries the force of the law.

See Diaz, 2005 U.S. Dist. LEXIS 30382 at *29-30 (internal citations omitted).

Clearly, there is no justifiable basis for Defendants to summarily conclude that New York has no overtime law. As there is a wealth of case law and wage orders properly promulgated that specifica lly regulate overtime compensation, it is apparent that New York does in fact have an overtime requirement under the State's wage laws.

2. Defendants' Assertion that a Claim For Overtime Wages Must Be Premised on a Specific Contractual Promise Contravenes the Weight of Authority Recognizing a Private Right of Action

Notwithstanding the weight of authority above, Defendants assert that overtime compensation is not a mandatory employment standard in New York, but rather, a luxury that can be created only by way of contract. Once again, such an argument is nothing more than a request that this Court simply ignore controlling regulations and judicial authority.

Significantly, other than *Gagen v. Kipany Prods., Ltd.*, 18 Misc. 3d 1144A (N.Y. Sup. Ct. 2004) – which is one of the three cases which comprise the "minority view" addressed above –[2] the authority on which Defendants rely does ***not*** even concern overtime claims under Article 6 at all. Rather, such opinions involved claims pertaining to "bonus" and "commission" compensation – claims which themselves are necessarily predicated on contract. *See Tierney v. Capricorn Investors, L.P.*, 592 N.Y.S. 2d 700 (1993) (concluding that plaintiff could not assert a claim to recover purported "bonus" compensation as "a willful failure to pay wages under Labor Law § 190" absent an "enforceable contractual right to those wages"); *Miller v. Hekimian Labs.*,

[2] Significantly, the *Gagen* Court's conclusion that a claim for overtime was dependent on the existence of contract was not supported by ***any*** analysis, but rather, was supported only by citation to *Hornstein* and *Gallegos*. As discussed above, these decisions have been criticized as lacking any analysis that could arguably support the conclusion that New York lacks a valid, enforceable overtime law.

Inc., 257 F. Supp. 2d 506, 519 (N.D.N.Y. 2003) (concluding that "without an enforceable contractual claim to the commissions he seeks, Plaintiff has no claim to those commissions under New York Labor Law.").[3]

Thus, Defendants' strained effort to assert that all overtime claims under New York law must be based on a separate contractual right is also predicated upon fallacious reasoning that disregards the overwhelming bulk of judicial authority recognizing overtime claims predicated solely on Article 6, Article 19 and Section 142-2.2. Accordingly, this Court must reject Defendants' assertion that a claim for overtime wages must be premised on the existence of contract.

3. The Commissioner's Creation of Overtime Laws Was a Proper Exercise of Delegated Power

Acknowledging (as they must) that New York in fact does have codified overtime law, Defendants then go on to attack the validity of the very overtime laws it first argued did not exist. Defendants claim that this Court must make the bold step of striking 12 N.Y.C.R.R. § 142-2.2as invalid on the grounds that the Commissioner's creation of overtime regulations exceeded his authority. *See* Def's. Mem. at 6-7. This argument is without merit.

As an initial point, Defendants' argument fails by virtue of the fact the New York Legislature codified a broad delegation of authority to the commissioner to establish ***any*** regulation the commissioner viewed as necessary. *See* N.Y. Lab. Law § 21(11) ("the commissioner … [m]ay issue such regulations governing any provision of this chapter as he finds necessary and proper.").

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[3] *Gagen v. Kipany Productions, Ltd.*, 18 Misc. 3d 1144A, 2004 N.Y. Misc. LEXIS 3143, at *2 (Sup.Ct. Nov. 26, 2004), *aff'd in part*, 27 A.D.3d 1042, 812 N.Y.S.2d 689 (3d Dep't 2006) is also inapposite insofar as the iisue there was whether the plaintiff was an independent contractor. *Id.* at *3. Here, Plaintiffs and the class members were employees of Defendants and therefore are eligible for overtime compensation under the New York Labor Law.

This broad grant notwithstanding, however, the Legislature expressly granted the Commissioner the power to adopt overtime regulations in order to carry out the purposes of the Minimum Wage Act and to protect minimum wage:

> If, on the basis of information in his possession with or without such an investigation, the commissioner is of the opinion that any substantial number of persons employed in any occupation or occupations are receiving wages insufficient to provide adequate maintenance and to protect their health, he shall appoint a wage board to inquire into and report **and recommend adequate minimum wages and *regulations* for employees in such occupation or occupations**.

See N.Y. Lab. Law §§ 653(1).

Significantly, the Legislature expressly contemplated that such regulations would encompass the subject of overtime compensation:

> Such recommended regulations ***may also include***, but are not limited to, regulations governing piece rates, incentives, and commissions in relation to time rates; ***overtime*** or part-time rates; waiting time and call-in pay rates; wage rate provisions governing split shift, excessive spread of hours and weekly guarantees; and allowances for gratuities and, when furnished by the employer to his employees, for meals, lodging, apparel and other such items, services and facilities.

See N.Y. Lab. Law §§ 655(5)(b).[4]

Pursuant to this grant of authority, the wage board recommended and the Commissioner adopted New York's overtime law, 12 N.Y.C.R.R. § 142-2.2. Thus, the Commissioner's creation of overtime laws was a proper exercise of his delegated power.

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[4] N.Y. Labor Law §656 further authorizes the Commissioner by order, to accept, modify or reject the wage board's report, with the regulations becoming effective thirty days after the Commissioner's order.

4. The New York Legislature's Express Grant of Authority to the Labor Commissioner to Create Overtime Regulations Was Constitutional

New York has consistently taken a very flexible approach when it comes to the delegation of legislative powers, which, as explained by the court in *Bourquin v. Cuomo*, is a necessity to enable government to be responsive:

> Recognizing the necessity of "some overlap between the three separate branches" of government as well as the "great flexibility" to be accorded the Governor in determining the methods of enforcing legislative policy, this Court in *Clark v Cuomo*... upheld against a separation of powers challenge to then-Governor Cuomo's issuance of an Executive Order establishing a Voter Registration Task Force with access to State agencies in distributing its materials. The decision in *Clark*, like others that followed... resulted from this Court's long-standing and steadfast refusal to construe the separation of powers doctrine in a vacuum, instead viewing the doctrine from a commonsense perspective. As Chief Judge Cardozo explained more than a half-century ago: "[t]he exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers."

See Bourquin v. Cuomo, 85 N.Y.2d 781, 785 (N.Y. 1995) (internal citations omitted).

The Court in *Matter of Gerald Levine* also took a lenient approach when it explained that the Legislature, in delegating power to an administrative agency, need only provide as much detailed guidelines as "reasonably practicable in the light of the complexities of the particular area to be regulated." *Matter of Gerald Levine,* 39 N.Y.2d 510, 515 (1976). The court went on to express that in many cases, the Legislature has no alternative but to enact statutes in broad outline, leaving to administrative officials enforcing them the duty of arranging the details. *Id.*

Here, the Legislature clearly satisfied the constitutional requirements when it granted authority to the Labor Commissioner to create overtime regulations. Indeed, N.Y. Lab. Law § 655(5)(b) contains standards that are well within the requirements expressed by the court in

Matter of Gerald Levine, as they expressly contemplate the creation of regulations governing overtime:

> "In addition to recommendations for minimum wages, the wage board may recommend such regulations as it deems appropriate to carry out the purposes of this article and to safeguard minimum wages.... **Such recommended regulations may also include, but are not limited to, regulations governing ... overtime or part-time rates**...."

See N.Y. Lab. Law § 655(5)(b) (emphasis added).

In addition to the standards provided in Section 655(5)(b), the "statement of public policy" codified by the Legislature at New York Labor Law § 650 provides the justification for a premium overtime compensation law as furthering the health and welfare of New York workers. *See* N.Y. Lab. Law § 650.

Moreover, in addition to the standards and guidelines that are provided by the Legislature, case law reveals that similar constitutional challenges to labor regulations have been defeated. For example, in *City of Amsterdam v. Helsby*, 37 N.Y. 2d 19 (1975), the court concluded that the Legislature's delegation of its power to regulate the hours worked and compensation for firefighters and policeman to a Board was proper and reasonable. Similarly, in *N.H. Lyons & Co., Inc. v. Corsi,* 116 N.Y.S. 2d 520 (N.Y. Sup. Ct. 1952), the court held that the State Industrial Commissioner did not exceed his authority by fixing minimum wage standards in the hotel industry.

Defendants repeatedly cite *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987) and a similar line of cases for the proposition that the Commissioner exceeded the bounds of authority conferred by the Legislature when it enacted overtime regulations. These cases have no application here. In *Boreali*, the Public Health Counsel, acting pursuant to Section 225(5)(a) of the Public Health Law which authorized them to deal with any matters affecting public health, enacted a comprehensive government code that governed smoking in public areas. The court held that while the broad enabling statute was a constitutional delegation of authority, the the Public Health Counsel exceeded its delegated power because it "stretched that statute beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be. *Boreali*, 71 N.Y.2d at 9-10. No analogous argument exists here, however, as the Commissioner was granted the ***express*** authority to create overtime regulations within the statute's themselves. See *N.Y. Lab. Law § 655(5)(b)*(Such recommended regulations may also include, but are not limited to, regulations governing … **overtime** or part-time rates….").

5. The Commissioner Properly Incorporated Sections of the FLSA

In a final effort to attack the validity of New York's overtime regulations, Defendants argue that even if the Labor Commissioner had the authority to create an overtime law, the regulation is invalid because it incorporates by reference the provisions of the FLSA. This argument, too, is without merit.

N.Y. Executive Law § 102 expressly permits a New York State agency to incorporate by reference federal statutes and regulations in its regulations provided that (1) the federal law is identified in the text of the regulation (NY CLS Exec § 102(c)) and (2) the referenced federal law is filed with the New York Department of State (NY CLS Exec § 102(d)).

Here, New York's overtime regulations satisfy both requirements. **First**, Section 142-2.2 not only identifies the relevant incorporated sections of the FLSA and the date of the statute in the text, the regulation also provides information on how to obtain copies of the FLSA. *See* 12 N.Y.C.R.R. § 142-2.2. **Second**, the Commissioner filed a copy of the FLSA with the

Department of State on December 16, 1986. *See Declaration of Charles Gershbaum, Exh. A.* Therefore, the Commissioner properly incorporated by reference provisions of the FLSA.

Contrary to Defendants' representations, the regulation adopted by the Labor Commissioner does ***not*** permit future overtime regulations not yet promulgated by the U.S. Department of Labor to automatically become New York State law without undergoing the usual vetting process. Section 142-2.2 provides, "An employer shall pay an employee for overtime at a wage rate of one and one-half time the employee's regular rate in the manner and methods provided in and subject to the exemptions of Section 7 and 13 of U.S.C. 201 et seq., the Fair Labor Standards Act of 1938, as Amended." 12 NYCRR § 142-2.2. This regulation adopts the FLSA provisions effective at the time the regulation was promulgated – not future amendments.

Additionally, New York law contains procedural safeguards which prevent "automatic" adoption of federal regulations. Under N.Y. Executive Law § 102(d), "[n]o amendment to any [incorporated federal law] shall be effective unless adopted in compliance with the applicable provisions of law and filed with the secretary of state pursuant to this section." Accordingly, no amendments to the FLSA will become the law of New York unless it is expressly adopts them according to established rulemaking procedures and is filed with the Secretary of State. Furthermore, Section 202 of the State Administrative Procedure Act ("SAPA"), which governs agency rulemaking, requires that before the adoption of any rule (including a revised or amended rule), the agency must, among other things, publish a Notice of Proposed Rulemaking in the New York State Register and give the public the opportunity to comment on the proposal in public hearings. *See* NY CLS St Admin P Act § 202(1). As is evidenced by these procedural safeguards, Section 142-2.2 does not permit automatic adoption of future amendments to the FLSA. Therefore, the Commissioner's promulgation of Section 142-2.2 was proper.

C. AS PLAINTIFFS' COMPLAINT DOES NOT DEMAND LIQUIDATED DAMAGES, DEFENDANTS' ARGUMENT THAT PLAINTIFF'S CLASS ALLEGATIONS MUST BE STRICKEN UNDER § 901(b) IS MOOT

Although Plaintiffs' Complaint does not contain a demand for liquidated damages, Defendants mount a somewhat confusing argument – claiming that Plaintiffs' class claims must be dismissed because CPLR § 901(b) does not allow a class action where a plaintiff seeks liquidated damages under the New York Labor Law. While the case law is clear that a Labor Law class actions may be maintained where a prior demand for liquidated damages has been waived – [5] a fact which Defendant readily admits [*See* Def's. Mem. at 10] – Plaintiffs are uncertain how it may waive something they have not demanded in the first instance.

Notwithstanding the forgoing, a plaintiff need not waive his or her right to liquidated damages in the complaint. In *Lee*, the court found that CPLR § 901(b) did not bar plaintiff's class claims where plaintiff stated his willingness to waive liquidated damages *at certification*. *Lee*, 236 F.R.D. at 202. Similarly, in *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81 (S.D.N.Y. 2001), the court granted plaintiffs' motion for class certification where plaintiffs offered to waive any right to recover liquidated damages as a condition of class certification. *Id.* at 95.

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[5] See e.g. *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 202 (S.D.N.Y. 2006) (permitting plaintiff to waive demand for liquidated damages alleged in complaint); *see also Smellie v. Mount Sinai Hosp.*, 2004 U.S. Dist. Lexis 24006 at *15(Nov. 29, 2004 S.D.N.Y.) ("the Court concludes that the proposed waiver of liquidated or punitive damages is permissible, removes the C.P.L.R. 901(b) barrier to the class action sought to be pursued here, and does not render Plaintiffs inadequate class representatives."); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 95 (S.D.N.Y. 2001) (same); *Brzychnalski v. Unesco, Inc.*, 35 F. Supp. 2d 351, 353 (S.D.N.Y. 1999) (same).

In sum, as Plaintiffs have not sought liquidated damages in their Complaint, and hereby disclaim any intent to pursue liquidated damages to the extent such damages are barred by CPLR § 901(b), Defendants' Motion to Dismiss on such grounds must be denied.

D. PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF IS PROPER

In Plaintiffs' Prayer for Relief, Plaintiffs request an injunction requiring Defendants to discontinue "the unlawful classification of assistant managers as 'exempt' employees" in violation of New York law. FAC, p. 11. Defendants argue that an injunction is not a proper remedy where adequate relief can be obtained by a money judgment or plaintiffs seek relief for past injuries. *See* Def's. Mem. at 10-11. However, where wrongful conduct is continuing, injunctive relief is appropriate. *See Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540, 547 (2d Cir. N.Y. 1967) (holding injunction was appropriate where the complaint alleged continuing wrongful conduct). Here, Plaintiffs allege that "it is and continues to be Defendants' policy to deprive persons employed in the job position as 'assistant manager,' including Plaintiffs, of wages to which they are entitled under the law." FAC, ¶ 2.

Ansonia Associates v. Ansonia Residents' Asso., 78 A.D.2d 211, 219 (N.Y. App. Div. 1st Dep't 1980), which is cited by Defendants, actually supports Plaintiffs' request for an injunction. In *Ansonia Associates*, the court affirmed the Supreme Court's order granting plaintiff's application for an injunction finding that injury to plaintiff would be continuous and a multiplicity of similar actions would be required if no injunction was granted. According to the court, "[e]quitable relief is appropriate to avoid a multiplicity of actions." *Id.* Here, if injunctive relief is not granted, Defendants' will be permitted to continue their wrongful conduct which will result in a multiplicity of actions. Therefore, Plaintiffs' prayer for an injunction is proper, and Defendants' motion to strike must be denied.

E. PLAINTIFFS' RELIANCE ON ARTICLE 19 OF THE NEW YORK LABOR LAW IS PROPER

Defendants falsely claim that Plaintiffs' references to the New York Labor Law Article 19, § 650, *et seq*. should be stricken because Plaintiffs are alleging overtime, not minimum wage, violations. *See* Def's. Mem. at 11. However, as discussed in detail above, Article 19 regulates minimum wage and overtime compensation. Furthermore, as noted in *Diaz*, "the Second Circuit Court of Appeals and other New York District Courts have verified that **overtime claims may be brought pursuant to NYLL § 650 *et seq*.**" *Diaz*, 2005 U.S. Dist. LEXIS 30382 at *30.

Section 655 provides for overtime rates and requirements. *Id.* at *20. Additionally, Section 663(1) provides for a private right of action by an employee for violation of New York's minimum wage and overtime laws. *Ling Nan Zheng v. Liberty Apparel Co.*, 2009 U.S. Dist. LEXIS 41624 (S.D.N.Y May 18, 2009) at *6. Like the FLSA, Section 650, *et seq*. and 12 NYCRR § 142-2.2 require an employer to pay overtime compensation of at least one-and-a-half the usual rate if an employee works more than forty hours in a workweek. *Iaria v. Metro Fuel Oil Corp.*, 2009 U.S. Dist. LEXIS 6844 (E.D.N.Y Jan. 30, 2009) at *4-5.

As Article 19 of the Labor Law regulates overtime compensation, Plaintiffs' references to Article 19 are proper. Therefore, Defendants' motion to strike must be denied.

F. PLAINTIFFS HAVE PROPERLY NAMED MARMAXX GROUP AS A DEFENDANT IN THIS ACTION

Defendant argues that Marmaxx Group was not Plaintiffs' employer and therefore should be dismissed from this action. However, this issue is not appropriate for resolution on a motion to dismiss.[6] As noted above, a court considering a motion to dismiss "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." *Tarshis*, 211 F. 3d at 35. The review of such a motion is limited, and "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Villager Pond*, 56 F. 3d at 378.

Here, Plaintiffs allege that Marmaxx Group was "[l]icensed to do business and doing business in the City, Counties, and State of New York," "[t]he employer of Plaintiffs and the proposed class," and "[r]esponsible for misclassifying assistant managers as 'exempt' employees and erroneously denying them overtime compensation." FAC, ¶ 12(a)-(c). Thus, Plaintiffs have alleged sufficient facts to maintain their claims against Marmaxx Group at this stage in the proceedings.

In an attempt to overcome these allegations, Defendants submit a declaration claiming that Marmaxx Group has no relationship to New York or any of Defendants' New York stores.[7] Such extrinsic evidence is improper at this stage in the litigation and must be disregarded by this Court. *See Vitrano v. U.S.*, 2009 U.S. Dist. LEXIS 32550 (S.D.N.Y. April 14, 2009) (courts should "'look only to the face of the complaint,' rather than to extrinsic sources"); *see also Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d. Cir. 2000) (finding it erroneous for court to rely on factual allegations outside of complaint in ruling on Rule 12(b)(6) motion).

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[6] In the spirit of cooperation, and in recognition that discovery has not been conducted thus far in the litigation, Counsel for Plaintiffs offered to voluntarily dismiss Defendant Marmaxx without prejudice in exchange of a more detailed declaration and a limited tolling agreement. However, Defendant Marmaxx declined Plaintiffs' offer.

[7] Significantly, the declaration of Joan Korzec-Brown filed in support of Defendant's instant Motion fails to include a statement that the declaration is made under penalty of perjury as required by 28 U.S.C. § 1746.

Even if the Court were inclined to consider the declaration submitted by Defendants, the conclusory allegations contained therein are insufficient to support dismissal of Marmaxx Group. Plaintiffs had, and continue to have, an appropriate basis for naming Marmaxx as a defendant. Defendant TJX Companies' 10-k states, "Marmaxx operates both the T.J. Maxx and Marshalls store chains." *See Declaration of Charles Gershbaum*, Ex. B (TJX Companies 10-k for Fiscal Year ending January 27, 2007), p. 3. Additionally, training materials and performance evaluations provided to plaintiff Nicole Archibald identify the Marmaxx Group. *See Declaration of Nicole Archibald*, Exs. A (Assistant Manager Performance Evaluation) and B (Assistant Manager Training Program). In fact, an introductory memorandum in the Training Manual is on Marmaxx Group letterhead and states, "Welcome to Marshalls! We, along with T.J. Maxx, comprise the Marmaxx Group as a Division of the TJX Companies, Inc." *See* Archibald Decl., Ex. B. At a minimum, Plaintiffs should be permitted to conduct discovery to determine whether Marmaxx Group is an appropriate defendant. Therefore, Defendants' request for dismissal must be denied.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' Motion to Dismiss be denied in its entirety.

Respectfully submitted,

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AFFIRMATION OF SERVICE

I hereby affirm that I caused to be served via electronic mail and regular mail a true and correct copy of the plaintiffs Opposition to the Motion to Dismiss or Strike Plaintiff's Amended Class Action Complaint, Memorandum of Law in support thereof, Compendium of cases, Declarations and Exhibits. On this 10th day of June 2009, upon:

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